

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO. E088 OF 2024

NELISON ARIGURA KIBET
APPELLANT

- VERSUS -

WEBUYE T. JUNCTION JIWEZESHE

SELF HELP GROUP..... 1ST
RESPONDENT

WANDERA DAVID BARASA 2ND
RESPONDENT

**(Being an appeal from the judgment and decree of Hon.
P.Y Kulecho PM delivered on the 17/5/2024 in Webuye
SPMCC No. E057 of 2023)**

JUDGMENT

1. The appellant filed a suit in the trial court by a plaint dated 18/4/2023, claiming general and special damages for injuries sustained in a road traffic accident on 19/3/2023 at Malaha on the Webuye - Kitale road.
2. The respondents filed a statement of defence dated 3/5/2023, in which they denied the appellant's claim and instead alleged contributory negligence on the appellant's

part, whilst also alleging fraud on the appellant's part in bringing the suit.

3. The matter proceeded to trial, and by a judgment delivered on 17/5/2024, the trial court dismissed the suit against the 1st defendant and entered judgment against the 2nd defendant as follows: -

a) Liability at 100% for the appellant against the 2nd defendant.

b) General damages Kshs. 100,000/-

c) Special damages Kshs. 6,690/-

d) Total = Kshs. 106,690/-.

4. Being dissatisfied with the said Judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated 5/6/2024 and raised three (3) grounds of appeal as follows: -

a) That the learned trial magistrate erred in law and in fact in dismissing the appellant's case against the 1st respondent when the learned trial magistrate had already entered judgement for the appellant against both the respondents.

b) That the learned trial magistrate erred in law and in fact in dismissing the appellant's case against

the 1st respondent, when the appellant's evidence was uncontroverted and there was overwhelming evidence on record including the Motor Vehicle Copy of Records and the Certificate of Insurance

c) That the learned trial magistrate erred in law and in fact in awarding damages that were inordinately low given the injuries that were sustained by the appellant, the authorities cited by the appellant and the rate of inflation.

5. The appeal was disposed off by written submissions; however, only the appellant's submissions are on record. The appellant submitted that the trial court erred and contradicted itself in dismissing the suit against the 1st respondent, the actual owner of the suit vehicle, having already found him liable and against the weight of the evidence on record.

6. That the award for general damages was inordinately low and ought to be replaced with an award of Kshs. 300,000/-. Reliance was placed on the cases of;

a) Catherine Wanjiru Kingori & 3 Others v Gibson Theuri Gichubi 2005] eKLR where the 3rd plaintiff suffered multiple soft tissue injuries on the left elbow joint and

injuries on both ankles and was awarded Kshs. 350,000/- as general damages.

- b) Vincent Cheruiyot Rono v Mombasa Maize Millers, Nakuru HCCC No. 109 of 2005 where the court awarded Kshs. 400,000/- as general damages in 2006 for various soft tissue injuries without any fractures.
- c) Poa Link Services Co. Ltd & Another v Sindani Boaz Bonzemo [2021] eKLR where the court awarded Kshs. 350,000/- for soft tissue injuries.
- d) National Industrial Credit Ltd & 2 Others v MNO (Minor suing through Next of friend and mother FNM) (Civil Appeal E035 of 2023) [2024] where Justice W.A. Okwany upheld an award of Kshs. 300,000/- for soft tissue injuries.
- e) Cheruiyot & Another v Onyisi (Civil Appeal E012 of 2021) [2024] where Justice R. Lagat Korir upheld an award of Kshs. 300,000/- for the plaintiff who sustained soft tissue injuries.

ANALYSIS AND DETERMINATION

7. This being a first appeal, the Court is duty-bound to evaluate the evidence at the trial afresh and come to its own independent findings and conclusions. (see *Selle & Anor v Associated Motor Boat Co Ltd & Others* [1968] EA 123).

8. Before the trial court, the appellant gave evidence as Pw1. He adopted his witness statement dated 18/4/2023 as his evidence in chief and his list of documents as P. Exhibits 1 - 10. He testified that he was a fare-paying passenger on board the suit vehicle. He reiterated the averments made in his plaint regarding how the accident occurred, stating that the suit vehicle was negligently driven by the 2nd respondent, causing it to lose control and roll. He further stated that, as a result of the accident, he sustained severe injuries and was rushed to Webuye County Hospital, where he was treated and discharged.
9. In cross-examination, the appellant told the court that he was seated in the rear seat and therefore did not see how the accident occurred. He also stated that he had since recovered from his injuries. The appellant then closed its case.
10. The respondents did not call any witness in support of their defence and elected to close their case.
11. The grounds of appeal may be summarised as whether the trial court erred in dismissing the suit against the 1st respondent and whether it erred in awarding damages that were inordinately low given the injuries sustained.
12. As to whether the trial court erred in dismissing the appellant's suit against the 1st respondent, the appellant's

claim was that the 2nd respondent was the negligent driver of the suit vehicle, while the 1st respondent was the beneficial owner of the suit vehicle and thus vicariously liable for the accident.

13. In its judgement, the trial court held that there was no evidence linking the 1st respondent to the claim, and therefore the claim against him failed.

14. In my view, this was an error on the part of the trial court, as it had, in the same judgement, held that the appellant had proved its case against the 1st respondent as the beneficial owner of the suit vehicle, not the 2nd respondent.

15. What then was the status of the 2nd respondent? It is trite law that he who alleges must prove. **Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya**, provides that: -

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

16. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that: -

“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

17. Accordingly, it was the appellant’s duty to produce evidence that the 2nd respondent was liable for causing the accident that resulted in the injuries he sustained.
18. I have perused the documents adduced by the appellant in support of its case. None of the documents refer to the 2nd respondent as the driver of the suit vehicle. In fact, the Police Abstract adduced as P. Exhibit 6 only identified the owner of the vehicle as the 1st respondent.
19. Accordingly, the trial court’s judgment in favour of the appellant against the 2nd respondent was an error that the trial court ought to have corrected after passing the judgment. In the circumstances, I find no reason to belabour this point. The trial court erred in entering judgment against the 2nd respondent for Kshs. 106,690/-.

20. In the circumstances, I find that this limb of the appeal succeeds.
21. As to whether the trial court erred in awarding general damages that were too low, the law on the circumstances under which the court will interfere with an award of quantum by the trial court is settled. The appellate court will only interfere with the award of damages if, in exercising its discretion, the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion, resulting in injustice, as held in the cases of Mbogo & another Vs Shah (1968) EA and Mkube v Nyamuro 1983 KLR 403.
22. Furthermore, the Court of Appeal in Loice Wanjiku Kagunda v Julius Gachau Mwangi CA 142/2003 (unreported) stated that: -

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but

whether the lower court acted on the wrong principles (see Manga vs Musila [1984] KLR 257)."

23. The principle was re-stated by the Court of Appeal in **Kemfro Africa Ltd v A.M. Lubia and Another (1988) KAR 722**, thus: -

"The Principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. The same position was taken in Denshire Muteti Wambui V. KPLC (2013) eKLR."

24. In the present case, the appellant proved that he sustained multiple soft tissue injuries to the neck, chest, back, right shoulder and right knee. In essence, the appellant sustained soft tissue injuries and had since

recovered from them at the time of giving his testimony. The trial court awarded Kshs. 100,000/- as general damages.

25. I have considered the injuries sustained by the appellant. They were in the nature of minor soft tissue injuries. Looking at the authorities relied on by the appellant, I note that in ***Vincent Cheruiyot Rono (supra)***, in addition to soft tissue injuries suffered, the plaintiff also sustained injuries to the cervical and lumbosacral spine while in the rest of the authorities cited, the plaintiffs sustained multiple soft tissue injuries far severe than those sustained by the appellant herein.

26. I found the following cases quite helpful in terms of comparison: -

a) In Daniel Gatana Ndungu & another v Harrison Angore Katana (2020) eKLR the respondent sustained a cut wound on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee. The court set aside the finding by the subordinate court that awarded Kshs 350,000 on general damages and substituted it with an award of Kshs 140,000.

b) In Justine Nyamweya Ochoki & another v Jumaa Karisa Kipingwa (2020) eKLR, the respondent suffered a blunt object injury to the lower lip, blunt object injury to the

chest and blunt object injury to the left wrist and was awarded Kshs 300,000 On appeal Nyakundi J. set aside that amount and awarded Kshs 150,000.

- c) In *John Wambua v Mathew Makau Mwololo & another* (2020) eKLR, the Plaintiff sustained blunt injury to the right shoulder and a blunt injury to the right big toe. The trial court assessed general damages for pain and suffering in the sum of Kshs. 120,000 and this was affirmed by the High Court.
 - d) In *Charles Gichuki v Emily Kawira Mbuba & another* (2018) eKLR, the respondent suffered a blunt injury (tender) on the right side of the face, a blunt injury (tender) on the shoulders, a blunt injury (tender) on the chest and a blunt injury (tender) to the left thigh. Serгон J. (as he was then) substituted the trial court's award of Kshs 400,000 with Kshs 300,000.
27. On reviewing the decisions on comparable injuries, although no two injuries can be exactly the same, I find that the trial court erred in the manner in which it assessed general damages for the injuries sustained. The trend demonstrated above is to award general damages in the range of Kshs 150,000 to Kshs 000. Taking into account inflation and the time lapse since the earlier awards were made, it is my view that an award of Kshs 100,000 was

inordinately low to warrant my interference with the trial court's award.

28. I am therefore persuaded that I should interfere with the trial court's award of general damages. As a consequence, I hereby set aside the trial court's award of general damages and replace it with an award of Kshs. 150,000/-.

29. The upshot of the above is that I hereby set aside the trial court's judgment and hold as follows;

a) ***Judgement is entered against the 1st respondent for the sum of Kshs. 156,690/-***

b) ***The appellant is granted costs of this appeal.***

**Dated, signed and delivered virtually this 16th Day of April
2026.**

R.E. OUGO

JUDGE

In the presence of:

Miss Nkadha h/b Mr. Okara For the Appellant

Respondents - Absent

Wilkister/ Adan - C/A

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